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Symposium Intellectual Property and Social Justice

***571** INTRODUCTION

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As Director of the Howard University School of Law's Institute for Intellectual Property and Social Justice (IIPSJ), I have the privilege of penning this foreword to the first Symposium on Intellectual Property & Brown v. Board of Education [FN1] (IP & Brown Symposium), a collaboration with the Howard Law Journal that examines the social policy goals of the intellectual property law. In the United States, the principal policy objective underlying the intellectual property law is that of achieving the widest distribution of the benefits of creative enterprise toward the greater public good. Notwithstanding this lofty objective, however, there is little question that the intellectual property law has far too often been deployed in the cause of profiteering exploitation and social injustice.

How often has the necessity-inspired "know-how" of the poor, the uneducated, and racial and ethnic minorities, who are unaware of the opportunities and protections afforded by the trade secret, unfair competition, and other intellectual property laws, been misappropriated by savvy but unscrupulous "entrepreneurs," who have access to the racial and financial capital vital to commercial development and exploitation of useful ideas? How many patents have been awarded to slave owners and businessmen in connection with revolutionary innovations developed by slaves, sharecroppers, and uneducated workers, under their aegis or within their employ? Indeed, is it even possible to tally, much less make reparation in connection with, the millions of dollars that African American and other artists and entertainers have been robbed of through the blatant exploitation of their aesthetic genius, and the concomitant manipulation of the copyright law by the entertainment conglomerates? And what do the recent travails of Native ***572** Americans in connection with their efforts to de-legitimize and invalidate the demeaning "Redskins" National Football League trademark (to say nothing of this nation's utter failure to protect and dignify Native American indigenous culture) signify about the construction and application of the intellectual property law to the rights and interests of all of America's disenfranchised?

Even now in the waning penumbra of the Civil Rights Era, many scholars, practitioners, and social activists fear that this sad tradition of inequitable exploitation will only pullulate, in light of the revolutionary advances in digital and other innovative technologies and inventions. In the twenty-first century, those who control the means of technological production can pillage globally with the press of a button; instead of "a dollar and a dream" all one needs is a scanner and a mouse. And perhaps the ultimate injustice is the likelihood that the victims of such technological imperialism will not even have access to the fruits of this strip-mining of their culture and creative genius. In this time of Cyber-Renaissance, the poor, the elderly, and many racial and ethnic minorities, lacking affordable access to computers and the marvel of the Internet, languish in a state of techno-illiteracy and isolation.

While there is certainly legitimate basis for these concerns, such a path is by no means unavoidable. Quite to the contrary, the digital revolution and similar technological advances present unheralded opportunities through which to confront these challenges from a socially redeeming vantage point. Rather than a means by which to create, sustain, and widen a "Digital Divide," the new technologies can provide the apparatus through which to achieve a more equitable distribution of the benefits of creative endeavor.

In order to attain these goals, however, it is necessary to reorient our construction and application of the intellectual property law toward the aspiration of social justice. Such reorientation requires recognition of the role of the intellectual property law in the Civil Rights Mission. The effectuation of this recognition in turn requires a collaborative enterprise between those involved in the stimulation and protection of intellectual endeavor and those dedicated to the preservation and protection of social and civil rights.

The IP & Brown Symposium is an effort to initiate just such a scholarly diphonia. It seeks to place the infusion of social justice into the intellectual property framework at the forefront of the struggle for economic empowerment and social equality. It endeavors to turn the ***573** lens of Brown, a lens ground in the social realities that result from a morally vacuous approach to law, toward the scrutiny and reevaluation of the policy goals and social impact of the intellectual property law.

Although this analytical realignment may seem daunting at first, it is not as difficult as it might appear. Indeed, one need only turn to no less authority than the U.S. Constitution to begin. Pursuant to Article I, Section 8, legislative authority to enact laws for the protection of intellectual property law is expressly granted to Congress, which has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." In accordance with this constitutional mandate, Congress and the courts have determined that unlike natural law regimes, the primary objective underlying American intellectual property law is to engender the broadest possible production and dissemination of creative works and inventions to society's benefit. It is through such widespread production and dissemination that the greatest amount of creative works and inventions are likely to reach the largest audience, who will not only benefit directly from the use of and exposure to such works, but will in turn build upon the ideas advanced therein, and thereby produce additional works and inventions to the further advantage of society as a whole.

As such, American intellectual property law embodies a system of individual property rights carefully balanced against the public interest. Congress provides secular incentive to creators by granting them the "exclusive right" to their works, that is, by recognizing individual property rights on behalf of creators in connection with the products of their intellectual labors. In accordance with Article I, Section 8, inventors of patentable discoveries are afforded the right to preclude others from duplicating and producing their inventions. As for artistic expression, specific uses of copyrightable works are designated as exclusive to authors, referred to as the copyright holder's "exclusive rights," such as the right to reproduce, distribute, or publicly perform copyrighted material. In exchange for these property rights, the public is guaranteed access to a supply of original creative works, to use, enjoy, and draw upon in their own creative and educational pursuits.

Despite this carefully balanced system, however, new inventions and discoveries receiving the boon of intellectual property protection ***574** do not always result in enhanced benefits to the public. The digital revolution of the late twentieth century provides one such example. On the one hand, government, academic, and business studies unequivocally confirm that the proliferation of personal computers, software programs, and the Internet has positively impacted the quantity and quality of art, music, and information available to all Americans engaged in the digital discourse. On the other hand, the advent of these technological advantages has meant just the opposite for some. For those who cannot afford the admission price into cyberspace, there has been little improvement in their cultural and pedagogical options. In fact, as the "connected" have an increasingly large cyber-library at their disposal, their distance from those stranded at the border of cyberspace widens daily.

Moreover, as electronic dissemination and archiving predominates, the "unconnected" may lose meaningful access to most creative works altogether, including traditional works simply no longer made available in non-digital formats. And even where non-digital access remains an option, a separate but unequal experience is likely to engender. Exposure to a musical masterpiece can be inspiring whether experienced live or through an antique Victrola, but how does one assess the effect of

the qualitatively different experience upon the inspiration and consequential contributions of the latter audience? And ultimately, who suffers most, that latter audience or society as a whole, which is now deprived of the possibly superior contributions that the live experience might have stimulated?

Arguably, the express language of Article I mandates a different come--or at least Congress seemed to have thought so in the past. When effectively lobbied, Congress has previously risen to the challenge and insured that the legal protections afforded new inventions and technological applications do not inadvertently frustrate the social policy goals of the intellectual property law as a whole. In these circumstances, Congress has construed and even amended the intellectual property law so that its extension to new inventions, discoveries, and applications do not defeat its overarching purpose.

For example, at the turn of the twentieth century, in response to concerns that the extension of copyright protection to the "new technological use" of playing musical compositions on mechanical piano rolls would grant the music industry control over the dissemination of musical works to the public, Congress amended the copyright law to provide for mandatory terms upon which copyrighted music would be ***575** licensed for mechanical piano roll use. In subsequent years, Congress would apply such compulsory copyright licenses to sound recordings, jukeboxes, cable retransmission of television broadcast signals, and public broadcasting.

Indeed, it is not necessary to stretch to the dawn of the twentieth century to find legislative and judicial shaping of the intellectual property law to achieve social utility in the face of revolutionary innovation. Congress has already taken such steps in connection with digital technology and related inventions and innovations.

With respect to software programs, their inclusion as literary works under the copyright law caused some courts to hold that a computer program is "copied" when a computer is turned on, that is, when the program is transferred from the permanent memory to the random access memory (RAM). These decisions effectively meant that computers could not be turned on for essentially copyright-unrelated tasks, such as computer maintenance, without the copyright holder's permission. This gave software program developers the ability to limit or control competition in the business of computer maintenance service.

At the same time, other courts were faced with the problem of protecting copyright holders from unauthorized dissemination over the Internet of traditionally copyrighted material, such as photographs and stories. Under the copyright law, courts had little alternative but to hold that entities that provided Internet access to the individual infringers might themselves be held vicariously liable for these infringement activities. Internet Access Providers, on the verge of bringing the Internet to millions of households, would now consider the cost of unpredictable infringement litigations in the calculus of providing affordable, widespread Internet access to the American public. Consequently, here too, rigid application of the copyright law threatened to undermine the overarching objectives of intellectual property protection.

Congress responded to each of these and other unintended byproducts of the application of the intellectual property law to the new digital technologies in 1998 with the passage of the Digital Millennium Copyright Act (DMCA). The DMCA amended various portions of the copyright law to address the unique issues presented by advances in digital information technology. The DMCA effectively extinguishes Internet Access Provider liability in connection with the misconduct of their customers. The DMCA also addresses the RAM ***576** copying/antitrust problem and provides that non-volitional RAM copying in connection with otherwise unrelated computer maintenance no longer constitutes copyright infringement.

Consistent with the constitutional mandate of Article I, Section 8 and the precedent of congressional (social) activism, the Digital Divide can be addressed as something other than an issue of social resource shortfalls, but rather as a problem of constitutional stature and one which warrants affirmative congressional intervention in, and perhaps even amendment of, the relevant intellectual property law. Interpreting and altering the intellectual property regime in order to promote the

development of the software industry and to enable the Internet to flourish without giving due consideration to the resulting Digital Divide contorts the intellectual property law in contravention of the express directives of the U.S. Constitution.

This Symposium is an effort to approach the intellectual property law from this perspective--the construction and application of the intellectual property law as an engine for social responsibility, change, and engineering. Steven Jamar offers a cartogram for applying the lessons of Brown to the threat of a technological regression to a separate but unequal society. Simone Rose entreats law and policy makers to balance the need for individual profit incentives against social utility imperatives, and to construct a patent protection framework that insures both vital research and the humane dissemination of life-saving drugs and pharmaceuticals. Kenneth Bassinger questions whether the patent "doctrine of equivalents" merely protects inventors from "knock-offs" of their inventions, or also unduly restricts the innovations of those priced outside the current system of patent protection. Robert Wright invites consideration of the question as to when "catchy" racial slurs, gender objectifications, and other verbal denigration ought to be considered inappropriate for even "neutral" commercial use. And Danielle Conway-Jones and Hokulei Lindsey challenge the entire intellectual property framework that disregards indigenous culture as intellectual property, at least until it is commercially exploited by majority entrepreneurs and other captains of modern industry. Each of these authors has accepted the gauntlet of mining the intellectual property law for socially beneficent provender.

Undoubtedly some lawyers, scholars, and social activists will review the contents of this Symposium and query how certain topics could have been left unexplored. In this regard, the Symposium will have accomplished one of its principal goals--to stimulate new thinking ***577** in this area and to illustrate that the questions of social justice pertinent to the intellectual property law are manifold and in need of comprehensive analysis and discourse.

Before delving into this socio-intellectual regale, some acknowledgments are in order: to my colleague Steven Jamar, who first suggested that the IIPSJ might construct a platform through which to invite scholars, practitioners, and social activists from outside of the Howard University School of Law (HUSL) to participate in and contribute to HUSL's re-envisioning of the Civil Rights Mission to encompass the issue of intellectual property and social justice, and whose suggestion provided the impetus for the present HLJ/IIPSJ collaboration; to the two Editorial Boards (E-Board) who undertook to publish this Symposium, Howard Law Journal (Journal) E-Board 2003-2004 and Journal E-Board 2004-2005, and particularly to Editor-in-Chief Emeritus Monya Bunch, HUSL 2004, who championed the idea of an intellectual property/social justice symposium and committed the resources of the Journal to the project; a very special acknowledgment to the Journal Articles Editor and IIPSJ Intern for Program Development Tameka Simmons, HUSL 2005, without whose exhaustive work as the symposium editor and the Journal liaison between IIPSJ and the Journal this Symposium would not have seen fruition; and to Dean Kurt L. Schmoke, for his support for the reconstruction of the HUSL Civil Rights Mission to embrace IIPSJ's exploration of the law and policy issues implicated in making intellectual property achievement more equitably distributed throughout American society and the global community.

We hope you find the IP & Brown Symposium engaging, thought-provoking, and challenging. Most important, we intend that this Symposium serve as a baton in the shaping of a new consonance for a socially responsible intellectual property regime.

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[FN1]. 347 U.S. 483 (1954).

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